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In the Supreme Court of the United States

OCTOBER TERM, 1977

CLARENCE M. SMALDONE, *et al.*, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1977. A petition for rehearing with a

suggestion of rehearing *en banc* was denied on June 3, 1977. The petition for a writ of certiorari was filed on July 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's instructions directed the jury to include individuals who should not have been included among the "five or more persons" that the government must prove participated in an illegal gambling business under 18 U.S.C. 1955.

2. Whether conversations of petitioner Reeb, intercepted pursuant to court-ordered electronic surveillance, were properly admitted into evidence.

3. Whether evidence of prior criminal activity of petitioner Villano was properly admitted.

4. Whether the district court committed reversible error in allowing the prosecutor to ask leading questions on redirect examination.

5. Whether the district court erred in refusing to order the disclosure of the identities of government informants.

6. Whether the district court properly limited defense counsel's cross-examination of an FBI agent regarding the agent's home address.

7. Whether the prosecutor acted improperly in asking a witness questions that he had reason to believe the witness would refuse to answer on Fifth Amendment grounds, when the prosecutor was prepared to and immediately did offer the witness immunity.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, each petitioner was convicted of one or more counts of a three-count indictment charging the operation of an illegal gambling business, in violation of 18 U.S.C. 1955 and 2.[1] The court of appeals affirmed (Pet. App.).

1. The evidence at trial proved the existence of three distinct bookmaking businesses in the Denver area. The first of these (Count III) began in August 1972 and continued through the 1972 football season. Dave Waters was the "phone man," disseminating line information and accepting wagers over the telephone (Tr. 433). He was hired by petitioner Villano (Tr. 429-434), who had set up the book-

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[1] Petitioner Smaldone, charged in all three counts, was convicted on Count III and was sentenced to four years' imprisonment and a fine of $15,000. Petitioner Reeb was convicted on all three counts and was sentenced to concurrent four-year prison terms and a fine of $7,500 (on Count III). Petitioner Villano, charged in Counts I and III, was convicted on Count III and was sentenced to four years' imprisonment and a fine of $15,000. Petitioner Whalen was charged in and convicted on Count I and was sentenced to five years' imprisonment (all but six months of which was suspended in favor of probation) and a fine of $3,000. Petitioner Gardner was charged in and convicted on Counts II and III and was sentenced to concurrent five year prison terms (all but six months of which was suspended in favor of probation) and a fine of $3,000 (on Count III).

making business and who accepted wagers and collected money from several bettors in the early fall (Tr. 312, 1269, 1404-1406). Later in the fall Waters was paid by petitioner Smaldone (Tr. 440-442), who also "settled with" several bettors (Tr. 1517).

Petitioner Reeb regularly called bettors concerning their accounts and met with and collected money from bettors (Tr. 388-391, 660, 665, 1153-1164, 1170-1171, 1273, 1279, 1410, 1491). Petitioner Gardner also collected money from bettors (Tr. 1411, 1491). Ray Rodriguez (also known as Tom) was hired by Waters, with petitioner Villano's knowledge, to assist Waters with his duties as the "phone man" (Tr. 459-460).

Jack Shaner regularly transmitted bets to Villano, on his own behalf and on behalf of others (Tr. 322, 326, 335, 450). For these efforts Villano paid him $40 or $50 from time to time (Tr. 323-324). Shaner testified that he took bets from others and was therefore able to protect himself against loss in making bets (Tr. 350). He also testified that "I'd take some bets and then I'd bet them off. I'd shave points, yeah. I'd get a point or two on the game and then try to catch the teams in the middle" (Tr. 354; see also Tr. 358-360, 362).

Jerry Woodward placed bets with Shaner, generally amounting to between $1,000 and $3,000 per weekend, on behalf of himself and from four to seven others (Tr. 286-295). He testified that Shaner would call him and give him "the line" and would regularly drive from Denver to Colorado Springs to settle their accounts (Tr. 289). Woodward relayed "the

line" from Shaner to the other individuals whose bets he placed with Shaner (Tr. 298).

The second bookmaking business (Count II) coincided with the 1973 football season. Kenneth Zeigler was the "phone man" (Gov't Exs. 109, 109A, 110; Tr. 847-850, 1494-1498), and petitioners Reeb and Gardner collected money from and paid money to bettors (Tr. 1167, 1171-1172, 1274-1279, 1414-1423). John Salanitro and Paul Cappelano, Omaha bookmakers, provided Reeb with line information and accepted "lay-off" bets (Gov't Exs. 118, 119; Tr. 950-959, 999-1005).[2] Ellis Smith, another bookmaker, received line information from and made "lay-off" bets with Ziegler, which he "settled with" petitioner Reeb (Tr. 742-744).[3]

The third bookmaking business (Count I) began in August 1974 and continued into the spring of 1975. Larry Lay was the "phone man" (Tr. 145-146, 150, 152, 1032-1033).[4] Lay received line information from petitioner Reeb, who also collected

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[2] To avoid losing money, bookmakers generally attempt to take an even amount of bets on each side of a contest. They make their money by requiring bettors to put up more money than they stand to win. In this case, for example, petitioners' customers generally had to put up $11 for each $10 they stood to win. A "lay-off" bet is usually a bet between two bookmakers who have too many bets on opposite sides of a contest and who seek to balance their accounts (see Tr. 740).

[3] Smith had at least one "employee," who took bets for him and received a percentage of the profits (Tr. 738).

[4] Lay testified that he accepted approximately $25,000 to $35,000 in wagers per weekend (Tr. 1048-1049).

money from and paid money to bettors (Tr. 1169, 1171-1172, 1252, 1262, 1276-1277, 1279, 1367, 1417, 1427). Petitioner Whalen also "settled with" bettors (Tr. 1339-1343, 1352-1355).

Persons named "Jack" and "Mike" collected money from bettors and placed bets with Lay (Tr. 152-153, 1062, 1081, 1278, 1366). George Iantorno, a bookmaker (Tr. 1008), placed lay-off bets with Lay (Tr. 1009-1011).

ARGUMENT

1. a. 18 U.S.C. 1955 prohibits illegal gambling businesses that, *inter alia*, involve "five or more persons." Count III of the indictment in this case charged an illegal gambling business in 1972 and 1973. Petitioners Smaldone, Reeb, Villano, and Gardner were convicted on that count. At trial, the government contended that, in addition to those four, Waters (the "phone man") and his hiree, Rodriguez (or "Tom"), were involved, as were Shaner and Woodward.[5] Petitioners claim (Pet. 17-26) that if the jury had been properly instructed it would not have included Woodward or Shaner among the "five or more persons" whose participation in the illegal gambling business the government was obliged to prove. Petitioners also assert that, if it had been

[5] The government also contended that co-defendant Raso participated in the 1972-1973 gambling business, but Raso was acquitted and we do not seek to include him as one of the five individuals whose participation was necessary to the convictions under Count III.

properly instructed, the jury would have counted either Smaldone or Villano, but not both, as making up the "five or more persons," since in petitioners' view the evidence showed that those two petitioners participated in the gambling business *seriatim* rather than simultaneously. Petitioners appear to concede that Waters could have been properly counted (Pet. 22, n. 4), and they say nothing about Rodriguez. Those two, added to petitioners Reeb and Gardner, and either Smaldone or Villano, make "five or more persons." Thus, even if petitioners were correct in arguing that Woodward and Shaner should have been excluded, and that either Smaldone or Villano should have been counted, but not both, we submit that the government proved its case, for there is no basis for concluding that the jury might have included Woodward and Shaner among the "five or more persons" and not Waters and Rodriguez—whose connection with the gambling business was more direct—as well.

In any event, petitioners' objections to the district court's instructions are unpersuasive. Although the petition does not specify any particular respect in which the instructions were erroneous, we take petitioners' argument to be that the district court defined the word "conduct" too broadly, failed to distinguish among different categories of individuals who may have had dealings with the illegal gambling business, and thereby "directed" (Pet. 21) the jury to include persons who should not have been included among the "five or more persons" necessary to a Sec-

tion 1955 violation.[6] The court defined "conduct" as follows (Tr. 1699):

> As used in the statute, the term "conduct" means to operate, carry on, cause to function, or to play any role in the furtherance of the gambling business, whether the defendant is on the highest or the lowest level of activity. The term includes everyone who participates in the operation of the gambling business, regardless of how minor his or her role may be, and whether or not that person is labelled or termed an agent, a runner, a collector, a salesman, a phone man, a clerk, lookout, independent contractor, layoff man, or some similar term.

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[6] In the district court, after the charge, defense counsel made the following objection (Tr. 1716-1717):

> MR. BARIS: * * * Your Honor, we will object to the word "conduct" as contained in your instructions.
>
> THE COURT: Very well.
>
> MR. BARIS: I think it is over-broad, and not within the concept of the statute, and includes many persons within illegal activity that should not have been included.
>
> There's no definition of words such as "independent contractors" and "layoff men" which I heard, terms that ought to be defined and are not known in the common knowledge of jurors.
>
> THE COURT: Well, have you got a definition of layoff men and independent contractors you would like to tender?
>
> MR. BARIS: I don't have one with me.

See also petitioners' brief in the court of appeals at page 11 ("* * * in the evidence, argument and instructions, there were no delineations of the various categories which may or may not be included. As a result, the convictions in this case resulted from the jury's being directed to include persons who must not under the law be counted * * *").

This definition was not overbroad. Congress intended Section 1955 to apply

> generally to persons who participate in the ownership, management, or conduct of an illegal gambling business. The term "conducts" refers both to high level bosses and street level employees.

H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 53 (1970). See *United States* v. *Box*, 530 F.2d 1258, 1264 (C.A. 5).

Petitioners assert (Pet. 18, 22) that Woodward and Shaner were mere bettors rather than participants in the illegal gambling business, but the district court clearly instructed the jury that bettors were not to be counted (Tr. 1699):

> The only person not included is a mere bettor who is entitled simply to his own winnings on his wagers, and who did not otherwise participate in the gambling business. As used in the statute, the term "finance", "manage", "supervise", "direct", and "own" are simply given their normal accepted meaning.

The jury may properly be assumed to have followed the court's instructions: if they counted Woodward and Shaner it was because they found those two to have been participants in rather than mere bettors with the gambling business. As the court of appeals correctly ruled (Pet. App. A2-A3), the evidence was clearly sufficient to have warranted such a finding (see pp. 4-5, *supra*). Thus, even assuming that the jury counted Woodward and Shaner, but not Waters

and Rodriguez, their conclusion that "five or more persons" were involved in the illegal gambling business was sound as a matter of fact and law.

Petitioners' claim that the jury may have counted both petitioners Smaldone and Villano, and that, if it did, then the verdict must be overturned, is also unpersuasive. Petitioners do not indicate where the record supports their contention (Pet. 14-15, 23-24) that Smaldone and Villano did not participate simultaneously in the gambling business. Presumably it is based on the testimony of Waters that after Villano went to jail on September 20, 1972, Smaldone began to perform some of his managerial duties (Tr. 439-442). Contrary to petitioners' suggestion (Pet. 23-24), however, this testimony did not oblige the jury to conclude that Smaldone and Villano were never involved in the gambling business together; rather, it supports the government's position that they participated in the business simultaneously, for it is unlikely that Villano would have turned over his managerial duties to a newcomer.

Petitioners assert (Pet. 23) that the decision below conflicts with that of the Fifth Circuit in *United States* v. *Bridges*, 493 F.2d 918 (C.A. 5). In *Bridges* the court held that under Section 1955 the government must prove that "five or more persons" participated in the illegal gambling business for at least 30 days: a gambling business that was conducted, for example, by three persons for 15 days and then by two other persons for the next 15 days would not fall within the reach of the statute. Petitioners argue

that the district court's instruction did not advise the jury of this requirement, and that in affirming their convictions the court below has therefore disagreed with *Bridges*.

Petitioners did not, however, object to the district court's instructions on this ground. The district court instructed the jury that the 30-day test "applies to the gambling business as an enterprise. It does not apply to any single defendant" (Tr. 1700). That instruction did not explicitly advise the jury that they had to find that five persons were involved on each of the 30 days the gambling business was in operation, but it was unquestionably correct (and in no way inconsistent with *Bridges*) in stating that the 30-day test "does not apply to any single defendant," and that is the only aspect of the instruction to which petitioners objected (Tr. 1717). Thus, petitioners failed to preserve and therefore waived the objection to the instructions that they now assert (see *Henderson* v. *Kibbe*, No. 75-1906, decided May 16, 1977, slip op. 8; Rule 30, Fed. R. Crim. P.). Moreover, on the facts of this case there is no conflict with *Bridges*, since the court below has simply ruled—as it should have—that to convict under Section 1955 the government need not prove that each individual defendant participated in the gambling business for the full 30 days.[7]

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[7] The Sixth Circuit, in addition to the Fifth, has held that under 18 U.S.C. 1955 the government must prove that at least five persons were involved in the illegal gambling busi-

b. Under Count II, charging a conspiracy during 1973, the government alleged that the participants were petitioners Smaldone, Reeb, and Gardner, as well as Ziegler (the "phone man") and bookmakers Salinitro, Cappellano, and Smith. Petitioners Reeb and Gardner were convicted. Petitioners assert (Pet. 25-26) that it would have been improper for the jury to count Salinitro, Cappellano, and Smith. But those individuals were shown to have exchanged "line" information with the gambling business and to have regularly accepted "lay-off" bets from it (see p. 5, *supra*). That showing was sufficient to allow the jury to find that they were participants rather than mere bettors. *United States* v. *Turzitti*, 547 F.2d 1003

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ness for all 30 days. *United States* v. *Tarter*, 522 F.2d 520. Both the Fifth and Sixth Circuits have also held that the government need not prove that any individual participant was so involved. *United States* v. *Marrifield*, 515 F.2d 877 (C.A. 5); *United States* v. *Mattucci*, 502 F.2d 883 (C.A. 6). In *United States* v. *Smaldone*, 485 F.2d 1333, 1351 (C.A. 10), certiorari denied, 416 U.S. 936, the court held that under Section 1955 the government does not have to show "that each conductor was involved in the gambling business for more than thirty days or generated at least $2000 gross revenue in a single day. These requirements refer to the gambling operation and not to individuals." In that case, as in this one, the litigated issue was not whether five or more persons must participate for more than 30 days, but whether each particular defendant must have participated for that period in order to be found guilty. There is, in sum, no basis for concluding that the Tenth Circuit would construe the pertinent requirements of Section 1955 differently from the Fifth and Sixth Circuits in cases raising these issues.

(C.A. 7), certiorari denied, April 18, 1977 (No. 76-1296); *United States* v. *Box*, *supra*.[8]

c. Petitioners Reeb and Whalen were convicted on Count I, charging an illegal gambling business in 1974. In addition, the government contended that Lay (the "phone man") as well as Jack and Mike (who collected money from bettors and placed bets with Lay) and Iantorno (a bookmaker who placed "lay-off" bets with Lay) were involved. Petitioners assert that it would have been improper for the jury to have counted Iantorno (Pet. 25-26). Aside from the fact that there were five participants even excluding Iantorno, he could have been properly counted for the same reasons that the jury could have properly counted Salanitro, Cappellano, and Smith as part of the illegal gambling business charged in Count II.

2. In November, 1973, telephone conversations between petitioner Reeb and Omaha bookmaker John Salanitro were intercepted pursuant to electronic surveillance on Salanitro's telephone authorized by order of the United States District Court for the District of Nebraska. Petitioners contend that evidence of these conversations was improperly introduced at trial due to lack of compliance with Title III of the

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[8] *United States* v. *Leon*, 534 F.2d 667 (C.A. 6), said by petitioners to conflict with the decision below (Pet. 25), is distinguishable, for there the government did not establish that bets placed by a bookmaker were in fact "lay-of" bets (*id.* at 677).

Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510 *et seq.*[9]

a. First, petitioners contend (Pet. 27-28) that evidence obtained by means of the wire interception should not have been disclosed absent a disclosure order under 18 U.S.C. 2517(5), because the "offense" specified in the application and order of authorization was different from the "offense" to which the intercepted conversations pertained. But the order of authorization specified that the interceptions were to be undertaken to investigate violations of 18 U.S.C. 1955 by Salanitro, other named Omaha bookmakers, and "others as yet unknown." The intercepted conversations between Reeb and Salanitro were used at trial as evidence of a violation of Section 1955 involving, *inter alia*, Salanitro. Thus, the offense in connection with which the evidence was used was encompassed within the terms of the order. This case therefore does not present the question that petitioners propound—*i.e.*, whether an order under 18 U.S.C. 2517 (5) is required for use of intercepted conversations in connection with a factually distinct offense against the same statute as that specified in the order, and, if so, whether the failure to obtain a disclosure order is a ground for suppression of evidence. Compare

[9] Petitioner Reeb alone has standing to raise these issues, since none of the other petitioners were parties to the intercepted conversations or were named in the application. See 18 U.S.C. 2510(11), 2518(10)(a); *Alderman* v. *United States*, 394 U.S. 165; *United States* v. *Armocida*, 515 F.2d 29 (C.A. 3), certiorari denied *sub nom. Gazal* v. *United States*, 423 U.S. 858.

United States v. *Vento*, 533 F.2d 838, 854-855 (C.A. 3), and *United States* v. *Brodson*, 528 F.2d 214 (C.A. 7).

b. Petitioner Reeb also complains (Pet. 28-29) that the government failed to serve her with an inventory notice of the November 1973 interception, as required by 18 U.S.C. 2518(7)(b). As the court of appeals observed, however (Pet. App. A4), Reeb's voice was not identified until October 1975. At that time Reeb's counsel was advised of the wire interception evidence, was permitted to listen to the intercepted conversations in which Reeb participated, and was given transcripts of the intercepted conversations (Supp. Hearing (10/31/75) Tr. 23-25). Thus, Reeb was given more information than that to which she was entitled under Section 2518(7)(b). Furthermore, in *United States* v. *Donovan*, 429 U.S. 413, 438-439, this Court held that a good faith failure by the government to comply with the inventory notice requirement is not ground for suppression under 18 U.S.C. 2518(10).

c. Finally, petitioners contend (Pet. 29-33) that the government's application for authorization of electronic surveillance did not contain "a full and complete statement as to whether or not other investigation procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c). The requirements of this Section are satisfied if the application and its supporting affidavit, viewed in a practical and common sense fashion (S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)),

demonstrate to the court that traditional investigative techniques will be inadequate to expose the full scope of the criminal activity under investigation or the identity of the participants therein. See, *e.g.*, *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Sklaroff*, 552 F. 2d 1156, 1159 (C.A. 5); *United States* v. *Turner*, 528 F.2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996; *United States* v. *Robertson*, 504 F.2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F.2d 219, 224 (C.A. 8).

The court of appeals properly concluded (Pet. App. A5-A6) that this test was satisfied here. The affidavit of FBI Special Agent O'Brien outlined seven months of investigative activity, including physical surveillance, that had failed to produce sufficient evidence to sustain a prosecution. The affidavit also included information from five confidential informants, each of whom was unwilling to testify due to concern for his safety.[10] Finally, the affidavit stated that the bookmaking activities under investigation were conducted in a highly secret manner and that most of the individuals involved appeared to be "surveillance conscious." In short, the affidavit, which showed both that other investigative techniques had failed and that they were unlikely to succeed in the future, satisfied

[10] Because the reluctance of certain informants to testify was due to fear for their safety, rather than concern about possible prosecution, it is not clear that their full cooperation could have been obtained through use of subpoenas and grants of immunity.

the requirements of 18 U.S.C. 2518(1)(c).[11] See *United States* v. *Abramson*, 553 F.2d 1164 (C.A. 8), certiorari denied, June 27, 1977 (No. 76-1672), in which the affidavit involved in this case was upheld in connection with another prosecution. See also *United States* v. *Sklaroff*, *supra*.

3. Petitioners contend (Pet. 34-36) that the trial court improperly permitted the government to introduce evidence that Villano had been involved in bookmaking prior to the periods of time covered by the indictment. Under Rule 404(b), Fed. R. Evid., however, evidence of other crimes is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Here, Villano's prior bookmaking activity was properly admitted to show a continuing scheme or plan, and the duration of bookmaking activity was in turn relevant to show that the bookmaking businesses were of the type covered by 18 U.S.C. 1955. The district court confined the inquiry to the general nature of Villano's activity (see Tr. 268-269) and gave limiting instructions as to the purpose for which the evidence was admitted (see Tr. 325, 378-379).[12]

[11] The court of appeals properly distinguished (Pet. App. A5-A6) *United States* v. *Kalustian*, 529 F.2d 585 (C.A. 9), cited by petitioners (Pet. 31). There the affidavit was based primarily on the experience of federal agents in other gambling cases. In *United States* v. *Pezzino*, 535 F.2d 483 (C.A. 9), the Ninth Circuit held that an affidavit similar to the one here involved was sufficient to pass muster under *Kalustian*.

[12] Contrary to petitioners' assertion (Pet. 34 n. 5), the limiting instruction was not confusing (Tr. 378-379). The

4. Petitioners argue (Pet. 36-39) that the district court erroneously allowed leading questions on redirect examination. Petitioners do not, however, cite any instance in which leading questions were used on redirect examination to elicit testimony that was more damaging to them than that elicited on direct examination. Accordingly in the circumstances of this case, there is no need to consider the correctness of the court of appeals' ruling (Pet. App. A6) that the district court did not abuse its discretion under Rule 611, Fed. R. Evid., for petitioners have failed to show reversible error in any event.

5. Petitioners contend (Pet. 39-42) that the district court improperly refused to direct the government to disclose the identities of informants who had given information to FBI Agent Malone.

This Court held in *Roviaro* v. *United States*, 353 U.S. 53, that as a general rule the government is privileged to withhold the identities of its confidential informants, but that the privilege must give way "[w]here the disclosure of an informant's identity, or of the contents of his communication, is relevant

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court charged the jury that evidence of bookmaking outside the times covered by the indictment was introduced "for the very limited purpose of showing a plan, scheme, or common operation." The court went on to instruct that the statements of any defendant may be considered against other defendants only if a concert of action was shown. Contrary to petitioners' suggestion, the existence of a conspiracy count is not a prerequisite for the latter instruction. *E.g.*, *United States* v. *Snow*, 521 F.2d 730, 736 (C.A. 9), certiorari denied, 423 U.S. 1090; *United States* v. *Snyder*, 505 F.2d 595 (C.A. 5), certiorari denied, 420 U.S. 993.

and helpful to the defense of an accused, or is essential to a fair determination of a cause * * *" (*id.* at 60-61). In this case there has been no showing that the identities of the informants would have been helpful to petitioners, and petitioners have offered no persuasive reason to believe that their interest in knowing the identities of the informants outweighed the government's interest in maintaining confidentiality. In these circumstances, petitioners were at most entitled to have the district court conduct an *in camera* inspection of the materials relating to the informants. See *United States* v. *Alvarez*, 469 F.2d 1065 (C.A. 9); *United States* v. *Poms*, 484 F.2d 919 (C.A. 4); *United States* v. *Edwards*, 503 F.2d 838 (C.A. 9), certiorari denied, 420 U.S. 977. The district court conducted such an examination and concluded that disclosure of the identities of the informants was unnecessary because none "could have any testimony which would be helpful" to petitioners (Pet. App. A6). That essentially factual determination does not warrant further review by this Court.

6. Relying on *Smith* v. *Illinois*, 390 U.S. 129, petitioners contend (Pet. 43-45) that the district court erred in refusing to permit defense counsel to ask FBI Agent Malone his home address. This Court's opinion in *Smith*, however, expressly recognizes the propriety of limiting cross-examination in the interests of protecting the witness (*id.* at 133, quoting *Alford* v. *United States*, 282 U.S. 687). A legitimate concern for the personal safety of a witness would appear to be one of the more compelling reasons for

restricting the scope of cross-examination. *Id.* at 133-134 (concurring opinion of Mr. Justice White, joined by Mr. Justice Marshall); *McGrath* v. *Vinzant*, 528 F.2d 681 (C.A. 1), petition for a writ of certiorari dismissed, 426 U.S. 902; *United States* v. *Crockett*, 506 F.2d 759 (C.A. 5), certiorari denied, 423 U.S. 824. Although an affirmative showing of potential danger may be necessary where the basis of concern was for the safety of the witness is not apparent (see *Smith* v. *Illinois*, *supra*, 390 U.S. at 133-134) (concurring opinion of Mr. Justice White, joined by Mr. Justice Marshall), such a showing is hardly necessary where, as here, both the nature of the offense and the occupation of the witness make the concern for the witness's safety obvious. *McGrath* v. *Vinzant*, *supra*.

Malone's name, occupation, and business address were on record. The narrow limitation upon cross-examination imposed by the district court was reasonably necessary for the protection of the safety of a law enforcement officer and cannot be said to have prejudiced petitioners in any respect.

7. Petitioners contend (Pet. 45-48) that the prosecuting attorney acted improperly when he called witness Jerry Woodward to the stand and asked him a question that he had reason to know Woodward would decline to answer on self-incrimination grounds. Woodward did decline to answer; upon the prosecutor's application he was granted immunity, and direct examination proceeded.

There was no impropriety in the action of the

prosecutor. In each of the cases petitioners cite (Pet. 47-48), the prosecutor called a witness with reason to know he would invoke his Fifth Amendment privilege, but with no intention of granting immunity. Such a situation poses the danger that, from the invocation of the privilege or from the prosecutor's questions, the jury will draw inferences that the defendant will be unable to rebut, since meaningful cross-examination of the witness is effectively precluded. This danger is not present where, as here, a grant of immunity follows the refusal to answer questions, for in such a case the defense has full opportunity to test the witness's testimony on cross-examination. Thus the court of appeals correctly rejected petitioners' claim in this regard.[13]

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[13] Even where the government does not grant immunity, a witness's invocation of his privilege against self-incrimination is not *per se* reversible error. If the instances in which the privilege is claimed are not of great significance in the context of the entire trial and the government has not deliberately attempted to profit from the refusal of witnesses to testify, reversal is not required. *Namet* v. *United States*, 373 U.S. 179.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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